

STATE OF MAINE  
PUBLIC UTILITIES COMMISSION

Docket No. 2000-56

December 4, 2000

BANGOR HYDRO-ELECTRIC COMPANY  
Request for Approval of Reorganization  
And of Affiliated Interest Transactions to  
Establish a Subsidiary, BangorCom, for the  
Purpose of Providing Multi-Strand Fiber  
Optic Cable to Communications Carriers  
Within its Service Territory

ORDER REGARDING  
PUBLIC UTILITY  
STATUS

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

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**I. SUMMARY**

On July 13, 2000, we approved Bangor Hydro-Electric Company's (BHE) reorganization petition in this matter to allow it to form Bangor Fiber Company Inc. (Bangor Fiber). In that order, we deferred the determination of whether Bangor Fiber should be considered a public utility to allow BHE to provide additional information to clarify the expected scope of Bangor Fiber's activities. Based on the additional information provided by BHE and the information in BHE's original petition, we now conclude that Bangor Fiber is not a public utility under Maine law because it is not holding itself out to provide services to the public or a particular segment of the public.

**II. DISCUSSION**

In its original petition, BHE made certain representations about the activities of its new telecom affiliate. BHE stated that its affiliate:

- will provide its facilities only to entities that provide telecommunications services and cable services providers;
- will require intrastate carriers to furnish evidence of appropriate certification from this Commission before providing them with facilities; and
- will not provide telecommunications services to any of its customers or contractors, other than BHE.

BHE also stated that "BHE expects that the bulk of [Bangor Fiber's] arrangements with fiber customers will be individually negotiated deals." In our July 13, 2000 Order, we concluded that BHE's statement did not "foreclose the possibility that it would hold out service at a given price to any taker." Accordingly, we invited BHE to provide additional information on this question.

In a technical conference held on August 15, 2000, BHE provided clarification about the nature and the scope of activities in which Bangor Fiber expects to engage. All parties agreed that the transcript would be included in the record of this case. Bangor Hydro indicated that Bangor Fiber would not offer service through any kind of standardized tariff or package. Rather “[e]ach deal is intended to be a separate deal. There will be separately negotiated prices [and] terms.” BHE further indicated that the rate charged by Bangor Fiber would be dependent on a number of factors including the difficulty of installation and maintenance and market considerations. BHE also stated that if the nature of Bangor Fiber’s activities changed, BHE would seek approval from the Commission for the new activities through a separate petition. The Public Advocate stated that, based on the clarifications made by BHE, he did not object to a determination that Bangor Fiber is not a public utility.

We consider the scope of Bangor Fiber’s expected activities in order to determine whether the activities meet the “public use” test. If the entity does not meet this test, it will not be considered a public utility. We have provided the following description of the public use test:

The test of a public utility is whether or not such a person holds himself out expressly or impliedly as engaged in the business of supplying his product or service to the public as a class or to any limited portion of it, as contradistinguished as holding himself out as serving or ready to serve only particular individuals. The public or private character is not dependent upon the number of persons by whom used, but whether [the business] is open to use and service of all members of the public to the extent of its capacity.

*New England Telephone Company*, Docket No. 84-208 at 3 (June 20, 1985). See also, *Gilman v. Somerset Farmers Cooperative Telephone Company*, 129 Me. 243, 247 (1930).

In an earlier order, we determined that FiveCom of Maine (now NEON) did not satisfy the public use test because it planned to negotiate specialized contracts with individual entities rather than providing service to any particular segment of the public. There we stated:

Based on the record, FCM will be providing its fiber optic network capacity to individual entities, rather than any particular segment of the public. It does not plan to make its services available to all certificated carriers on universally applicable terms and conditions. It will individually negotiate prices and terms and enter particularized contracts with individual certificated carriers, which FCM has determined have the financial resources to perform the contract obligation, the technical competence to support the product that FCM is providing, and the operational ability to support the customers they seek to serve. FCM will not offer standardized contracts or service to potential customers and, thus, will not hold itself out

as willing to provide service on similar terms to all entities that are similarly situated. For these reasons we find that FCM's activities in Maine do not satisfy the public use test.

*Central Maine Power Company, Application to Invest Funds in Telecommunications Project and Approval of Related Affiliated Interest Transactions, Docket No. 96-537, Order Regarding Public Utility Status at 3 (December 2, 1997).*

We find that Bangor Fiber's activities, as clarified in the August 15, 2000 technical conference, are similar in nature to those described in the FiveCom Order and thus do not satisfy the public use test.<sup>1</sup> Accordingly, we conclude that Bangor Fiber is not a public utility.

Dated at Augusta, Maine, this 4<sup>th</sup> day of December 2000.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl  
Administrative Director

COMMISSIONERS VOTING FOR:      Welch  
   Nugent  
   Diamond

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<sup>1</sup> We caution against a broad interpretation of our holding here. The public use test is based on evaluation of all the facts and circumstances of the case to determine whether the entity is or is not holding itself out to provide service to the public or a segment of the public.

## NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Civil Procedure, Rule 73, et seq.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.